



U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of the General Counsel
14th and Constitution Ave. NW
Washington, D.C. 20230

July 24, 2000

Chuck Finley
Acting Regional Administrator
Environmental Protection Agency, Region X
1200 Sixth Avenue
Seattle, WA 98101

Tom Fitzsimmons
Director
Department of Ecology
P.O. Box 47600
Olympia, Washington 98504 -7600

Dear Chuck and Tom:

I am writing on behalf of the National Oceanic & Atmospheric Administration (NOAA) in its capacity as a Natural Resource Trustee for Elliott Bay and the Duwamish River. I understand that EPA Region 10 and the Washington Department of Ecology plan to publish a public fact sheet and request comments on a proposed approach for investigating contamination in the Lower Duwamish River. In lieu of placing the site on EPA's National Priorities List (NPL), EPA, Ecology, and the Lower Duwamish Group of potentially responsible parties (PRPs) propose to conduct a remedial investigation using a negotiated Administrative Order on Consent (AOC) pursuant to CERCLA and MTCA authorities. I am writing to forward NOAA's recommendation that EPA propose the Duwamish River site for listing on the NPL.

The concept of a "non-NPL" approach to the remedial investigation and ultimate cleanup of the Lower Duwamish River was discussed by a number of stakeholders last year at a meeting in the offices of King County Executive Ron Sims. As a follow-up to that meeting, you proposed in writing a set of actions that would be needed to achieve efficient and effective environmental and human health protection in the Lower Duwamish River in the absence of a listing of the site on the NPL. Among these actions, it was stated that the Tribes and Natural Resource Trustees are partners in the remediation process and that appropriate "tolling" agreements from certain parties extending the statute of limitations for bringing natural resource damage claims would be required. The intention of this requirement was understood to assure that the AOC approach ensures an equivalent level of protection for the public trust rights as that provided for under an NPL listing.

Despite our best efforts, we have been unable to secure adequate tolling agreements with two of the PRPs whom we have approached: The Boeing Company and the Port of Seattle. While we have a limited tolling agreement with Boeing, it does not afford a level of legal protection equivalent

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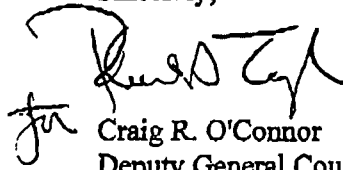
to that which would arise by statutory provision under an NPL scenario. Unfortunately, we have been unable to reach agreement on a revised tolling agreement that would protect the Trustees' ability to bring natural resource damage claims on behalf of the public in a manner equivalent to an NPL listing. The Port of Seattle is unwilling to agree to terms different from those the Trustees have reached with Boeing.

In addition to the natural resource damage claim statute of limitations issue, there are other issues, including tribal and public participation, which remain to be resolved before a non-NPL approach to remediation of the Duwamish would reasonably safeguard the interests of all the stakeholders.

Since the lack of adequate tolling agreements places the Trustees at a disadvantage relative to our legal standing under an NPL listing, and since EPA and Ecology committed to ensuring that the AOC approach would not do so, we cannot support the remedial concept that is to be proposed in the public fact sheet. Instead, we recommend that the EPA propose the Duwamish River site for listing on the NPL.

To foster thorough and efficient collaboration in our mutual efforts to clean up and restore the Duwamish, NOAA on behalf of the Trustees will shortly forward to EPA and Ecology a draft Cooperative Management Agreement, which may serve as a framework for sharing information and minimizing delays and duplications of effort. We would welcome an opportunity to meet with EPA and Ecology to discuss this and other steps we may take to ensure that the commitments we made to an efficient and effective remediation are fulfilled.

Sincerely,

A handwritten signature in black ink, appearing to read "Craig R. O'Connor", is written over a horizontal line. To the left of the signature, the letters "for" are handwritten vertically.

Craig R. O'Connor
Deputy General Counsel

cc: Natural Resource Trustees
William Brighton, Department of Justice